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IN THE

Supreme Court of the United States

October Term, 1963

No. 312

W. P. KENNEDY, as President of the Brotherhood of THE LONG ISLAND RAIL ROAD COMPANY, etc., *et al.*,

Petitioners,

—against—

THE LONG ISLAND RAIL ROAD COMPANY, *etc., et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	3
Jurisdiction	3
Question Presented	3
Statutes Involved	3
Statement	4
Reasons for Granting the Writ	6
Conclusion	7
Appendix:	
Opinion of the United States District Court for the Southern District of New York, per Ryan, Ch.J	9
Opinion of the United States Court of Appeals for the Second Circuit	35
Sections of the United States Code:	
Sherman Anti-Trust Act, 15 U. S. C. §1	50
Interstate Commerce Act, 49 U. S. C. §5(1)	50
Service Interruption Policy of The Imperial Insurance Company, Limited	51

PAGE

Table of Authorities

Cases:

Anderson v. The Shipowners Association, 272 U. S. 359 6

NLRB v. Truck Drivers Union, 353 U. S. 87 7

Statutes:

15 U. S. C. §1 ..... 3, 51

28 U. S. C. §1254(1) 3

49 U. S. C. §5(1) 3, 51

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners herein are: W. P. Kennedy, as President of the Brotherhood of Railroad Trainmen, an unincorporated association, and Brotherhood of Railroad Trainmen, in its own right and as representative of Road and Yard Conductors, Ticket Collectors, Road and Yard Brakemen, Switchtenders and Trainmen; Harold J. Pryor, individually, and as General Chairman of the General Grievance Committee of the Brotherhood of Railroad Trainmen-Long Island Rail Road, and General Grievance Committee of the Brotherhood of Railroad Trainmen-Long Island Rail Road, an unincorporated association, in its own right and as representative of Road and Yard Conductors, Ticket Collectors, Road and Yard Brakemen and Switchtenders, employees of the Long Island Rail Road Company; Frank S. Bohl, individually, and as President of Lodge 517 of the Brother-

hood of Railroad Trainmen, and Lodge 517 of the Brotherhood of Railroad Trainmen, an unincorporated association, in its own right and as representative of Road and Yard Conductors, Ticket Collectors, Road and Yard Brakemen, and Switchtenders, employees of the Long Island Rail Road Company; Frank Ryan, individually, and as President of Lodge 1090 of the Brotherhood of Railroad Trainmen, and Lodge 1090 of the Brotherhood of Railroad Trainmen, an unincorporated association, in its own right and as representative of Road and Yard Conductors, Ticket Collectors, Road and Yard Brakemen and Switchtenders, employees of the Long Island Rail Road Company; Road and Yard Conductors, Ticket Collectors, Road and Yard Brakemen and Switchtenders employed by the Long Island Rail Road Company in the month of July, 1960, the same constituting a class of approximately 1350 individuals who are so numerous as to make it impracticable to bring them all before the Court; and Superintendents, Train Dispatchers, Station Employees, Yard Masters and Yard Clerks, Switch and Signal Tenders, Enginemen, Laborers, Clerks, Maintenance Men and Electricians, employed by the Long Island Rail Road Company in the month of July, 1960, the same constituting a class of approximately 5350 individuals who are so numerous as to make it impracticable to bring them all before the Court.

The Respondents herein are: The Long Island Rail Road Company, the Association of American Railroads, and twenty-two (22) other railroads.

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 14, 1963, which judgment affirmed the judgment of the United States District Court for the Southern District of New York dismissing the Petitioners' complaint.

Opinions Below

The opinion of the United States District Court for the Southern District of New York, per Ryan, *C.J.*, is reported at 211 F. Supp. 478, and may be found in the Appendix at page 9.

The opinion of the Court of Appeals, per Kaufman, *J.*, is reported at —— F. (2d) ——, and may be found in the Appendix at page 35.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). The judgment of the Court of Appeals was entered on June 14, 1963.

Question Presented

The question presented is whether the agreement in the railroad industry (referred to throughout as the "strike insurance agreement") constitutes a per se violation of the anti-trust policies of the United States, as expressed in the Sherman Act, 15 U. S. C. §1, and the Interstate Commerce Act, 49 U. S. C. §5(1).

Statutes Involved

The relevant section of the Sherman Act is printed in the Appendix hereto, *infra*, at page 50. The anti-pooling provision of the Interstate Commerce Act, 49 U. S. C. §5(1) is printed in the Appendix hereto, *infra*, at page 50.

Statement

The form of the action in the District Court was to recover damages. The plaintiffs in the District Court were the employees of the Long Island Rail Road and the collective bargaining representatives of some of them. The defendants other than the Long Island Rail Road and the Association of American Railroads were a number of other railroads over whom personal jurisdiction was obtained and who participated in the strike insurance agreement. The case was tried by the Court without a jury on the issue of liability. Had the Petitioners been successful, a subsequent trial would have presented the issues of the extent of damage, if any, which the Petitioners may have sustained by reason of the strike insurance agreement.

An alleged insurance company incorporated under the laws of the Bahamas, and a bank, which were either participants or functionaries in the strike insurance agreement, were not parties to either the trial or the appeal.

The Petitioners do not here urge that any statute of the United States was violated per se by the payment of $50,000.00 each day to the Long Island Rail Road during the course of the work stoppage on that railroad. The issue to be decided by the Court is rather whether or not the underlying agreement, when entered into by the defendants and other railroads handling over 99% of the freight ton miles and passenger miles in the United States, constituted an illegal monopolistic enterprise.

Because of the essentiality of the agreement, the Petitioners have taken the liberty of printing a sample of the agreement in the Appendix at page 51. The only variations between the agreement printed in the Appendix and the agreements covering the balance of the railroads in the

plan (99% of the industry) are in the amounts deposited, the amounts obligated, and the amounts of benefits.

Only the following additional facts, established by stipulation, need be considered by the Court:

1. The Advisory Committee referred to in the "insurance policy" and whose broad discretionary and ultimate powers are spelled out by a comprehensive reading thereof, are in fact the heads of the 3 subordinate regional organizations of the Association of American Railroads, to wit: the Eastern Railroad Presidents Conference, the Southeastern Railroads, and the Association of Western Railways.

2. Practically every railroad in the United States has (a) deposited varying sums of money and (b) obligated itself for varying additional sums of money, subject to the ultimate authority and control of the aforesaid Advisory Committee. The amounts thus deposited and the extent of daily liability under the agreement go as high as $600,000.00 in the case of the Pennsylvania Railroad, and lesser amounts in the case of other railroads.

3. Industry-wide bargaining in railroading under the Railway Labor Act is carried out only on a voluntary basis and where there is mutual agreement to bargain nationally.

4. The strike insurance agreement became effective on September 1, 1959.

5. The Long Island Rail Road was a participant in the plan when it proposed some 12 changes in the working rules applicable to its employees, which proposals, together with the employees' demands, became the subject of the collective bargaining controversy which led to the strike.

It is the Petitioners' submission that illegality as a matter of law tainted the substance of the first step taken by the Long Island Rail Road in utilizing the collective bargaining procedures of the Railway Labor Act, in that the carrier's proposals for rules changes were made with the knowledge that the Long Island Rail Road was economically bound together with 99% of the railroad industry by contract and that penalty monies and obligations had been deposited to secure conformity in the collective bargaining postures of the industry.

Reasons for Granting the Writ

The legalization of the strike insurance agreement in the railroad industry dooms free collective bargaining in that industry by depriving each carrier of the unfettered independence of judgment to make a decision in labor relation matters. Article VII of the policy states that "the insured shall be free at any time without prejudice to this insurance to make with the labor organization or organizations concerned an agreement that results in a termination of such work stoppage." In spite of this language, however, the policy imposes economic restraints, in that such a settlement changes the carrier from a beneficiary of indemnities, to a financial supporter of the obligations of the "insurance company" to any other carrier involved in a work stoppage. In order to withdraw from the plan, a carrier must (a) forfeit its initial premium, (b) potentially forfeit its contribution to the pool at Barclays Bank in the Bahamas, (c) remain liable for its pro rata contributions to any railroad then receiving support during a work stoppage.

The decision of the Court of Appeals is in direct conflict with the decision of this Court in *Anderson* v. *The Shipowners Association*, 272 U. S. 359, upon which Petitioners relied quite heavily in the Court of Appeals and which

apparently was completely ignored by the Court of Appeals.

In a very real sense labor unrest in the railroad industry involves primarily a dispute over working rules, an area in which employers have been the aggressors. The agreement attacked here lends itself to the unitizing of the industry for these aggressive purposes, thereby assuring a national transportation crisis rather than a piecemeal, geographic or other free enterprise solution to working rule problems.

In the process, the A. A. R. has been converted from a voluntary trade association to a giant, unregulated monopoly in the area of purchasing labor. See: *NLRB* v. *Truck Drivers Union*, 353 U. S. 87. These monumental developments in collective bargaining should not occur without the scrutiny and consideration of the nation's highest Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion by Ryan, Ch.J.

RYAN, *Ch.J.*:

This suit for money damages has been filed by the Brotherhood of Railroad Trainmen (B. R. T.) and its officers against the Long Island Rail Road Company (Long Island), twenty-two other railroads, the Association of American Railroads (A. A. R.), and a bank. The damages are alleged to have arisen from a labor dispute which culminated in a strike called and conducted by the B. R. T. against the Long Island for some twenty-six days during July and August of 1960. The complaint alleges that the strike was the proximate result of strike insurance obtained by the defendants which is claimed to violate three federal statutes: the Railway Labor Act, the Interstate Commerce Act, and the Sherman Act; and to constitute a tortious act under New York law.

The first phase of this suit—that of liability—was tried to the Court on two depositions and an agreed statement of facts, which, together with annexed exhibits, was admitted as plaintiffs' Ex. 1. There was reserved for later jury trial the determination of consequential damage, if any, should the question of liability be determined in favor of plaintiffs.[1]

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[1] The plaintiffs have objected to the relevancy of the stipulated items of fact and exhibits, specifically to evidence of the actual course of strike settlement negotiations between the Long Island and the plaintiffs. It is the plaintiffs' view that the actual course of negotiations is not relevant to the issue of whether or not participation in strike insurance was legal or illegal but that it may become relevant only on the issue of whether or not the damages which the plaintiffs sustained were brought about by the illegal conduct of the defendants. We overrule this objection.

Plaintiffs have charged that sometime prior to July 13, 1959, the vice-president in charge of the law department of the A. A. R. met with designated representatives of the other railroad defendants to evolve an illegal and secret conspiracy whereby the defendant railroads and others represented in the A. A. R. could pool portions of their assets and earnings for the purpose of making a portion of gross earnings of all the alleged conspirators available from a pool to assist any participating conspirator which might be affected by a work stoppage, thereby artificially strengthening the economic bargaining position of any individual conspirator in its collective bargaining activities with organized labor. Plaintiffs also allege that the purpose of said conspiracy was to promote and encourage lengthy work stoppages and lockouts in violation of the National Transportation Policy and in violation of the Railway Labor Act (45 U. S. C. §§ 151, 151(a) et seq.). Plaintiffs further charge that, as a further part of said conspiracy, the defendants agreed that the A. A. R., through its vice-president in charge of public relations, using illegally pooled earnings of the defendants, would embark upon an expensive and elaborate public relations program critical of the prevailing rules agreements between railway labor and the railroads, which program was designed to create a climate of public opinion which would accept a prolonged interruption in the rail transportation system in the United States whether by strike or lockout.

The only question presented for determination is whether as a matter of law membership in the railroad industry strike insurance plan here present violates any of the statutes and is unlawful as charged.

Plaintiffs argue that this "strike insurance plan" violates the Railway Labor Act's requirement of good faith

bargaining in that participation in the plan is so destructive of the appropriate mental set for collective bargaining as to amount to an absence of good faith as a matter of law.[2] Plaintiffs also urge that this absence of good faith is further evidenced by the fact that participation in the plan by the Long Island introduced an element of multi-party bargaining into the Long Island dispute.

Plaintiffs continue in their reasoning that these duties imposed by Section 152 of the Act are rights legally enforceable under the Act by the carrier's employees by the filing of a civil suit to recover pecuniary damages as well as to obtain injunctive relief (*Virginia Railway* v. *Federation*, 300 U. S. 515 [1 LC ¶ 17,022]), although admittedly the statute creates no such specific cause of action.

Defendants invoke the Clayton and Norris-LaGuardia Acts (29 USCA 52, 101 et seq.) as protecting the activities complained of and deny any violation of the Railway Labor Act.

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[2] Section 152 (45 U. S. C. A.)—General Duties—Duty of carriers and employees to settle disputes.

FIRST. It shall be the duty of all carriers . . . and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives.

SECOND. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Designation of disputes by representatives.

THIRD. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence or coercion by either party over the designation of representatives by the other. . . .

Facts

The plaintiff B. R. T. is a labor organization representing approximately 200,000 employees of railroads throughout the country. As their bargaining agent, it authorizes and controls strikes by its membership and maintains "Strike and Protective Funds" to pay strike benefits to its members when it conducts a strike, or when its members are unemployed because of a strike called by other labor organizations.

Also named as plaintiffs are the two B. R. T. local lodges on the Long Island and the General Committee of the B. R. T. representing the Conductors, Ticket Collectors, Brakemen and Switchtenders employed by the Long Island as well as various officers of the B. R. T. The complaint alleges that these plaintiffs are suing in their own right and as representatives of classes of unnamed Long Island employees.

The defendants are the Association of American Railroads, the Long Island and twenty-two railroads.[1] Each of

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[1] The defendant railroads are as follows:

The Atchison, Topeka & Santa Fe Railway Co.
The Atlantic Coast Line Railroad Co.
The Baltimore & Ohio Railroad Co.
Boston and Maine Railroad
The Central Railroad Company of New Jersey
The Chesapeake and Ohio Railway Co.
Chicago, Burlington & Quincy Railroad Co.
Chicago, Rock Island and Pacific Railroad Co.
The Delaware and Hudson Railroad Corp.
The Delaware, Lackawanna and Western Railroad Co.
The Denver and Rio Grande Western Railroad Co.
Erie Railroad
Great Northern Railway Co.
Lehigh Valley Railroad Co.
The Long Island Railroad Company
The New York, New Haven and Hartford Railroad Co.
The New York Central Railroad Co.
Northern Pacific Railway

the defendant railroads furnishes transportation by rail, as defined in the Interstate Commerce Act (49 U. S. C. § 1).

All defendant railroads are members of the A. A. R., an unincorporated association formed in 1934 to handle matters of common concern to the railroads, to represent the railroads before governmental bodies and to serve as a joint agency of the railroads in such matters as research, operations, traffic, accounting and finance. It maintains a Public Relations Department in charge of advertising and other activities in presenting information to the public, and a Law Department which handles legal matters of interest to the railroads.

Although not determinative of the legality of the strike insurance plan under attack, the background and events leading up to its adoption are certainly relevant to the purpose and intent of the defendants in adopting the strike insurance plan and its effect.

The strained financial condition of many of the American railroads for the past few years, and at present, is a matter of public knowledge and national concern.

It is conceded by all that return on investment of the average road attained the level of 4% only once in the six years (1954-1959) and dropped to 2.72% in 1959. The Long

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The Pennsylvania Railroad Co.
Southern Pacific Co.
Southern Railway
Union Pacific Railroad
Wabash Railroad Co.

The action has been dismissed for want of jurisdiction or improper venue as to Grand Trunk Railway System, Chicago & Eastern Illinois Railroad, Chicago Great Western Railway, Chicago & North Western Railway Co., Illinois Central Railroad, Missouri-Kansas-Texas Railroad Co., Norfolk and Western Railway Co., Minneapolis, St. Paul and Sault Ste. Marie Railroad Co. and Imperial Insurance Company.

A severance was ordered as to plaintiffs' claim against Barclays Bank.

Island's earnings during this period were even lower; its rate of return in 1959 was only 0.72% and these meager earnings were realized by it only because it occupies a unique position as a railroad redevelopment corporation organized under special legislation of the State of New York. The principal business of the Long Island is carrying approximately 54 million commuter passengers annually, although it also carries some 20 million other passengers and 4½ million tons of freight annually.

In 1949, unable to meet its debts, it filed a petition in bankruptcy and was operated by Court-appointed trustees until 1954. A study of the Long Island by a public authority created by the New York legislature found that continuation of service by that road was essential in the public interest, and that its rehabilitation and continued service would be economically feasible only if payments of dividends and interest on indebtedness to its principal stockholder, the Pennsylvania Railroad, were suspended, its taxes reduced, and its passenger fares increased to cover its rising operating expenses plus the costs of a necessary program of rehabilitation. These provisions were incorporated into a plan of reorganization under which the Long Island qualified as a railroad redevelopment corporation under newly enacted state legislation.

Under this railroad redevelopment legislation, the fares of the Long Island are adjusted so as to cover its operating expenses, interest and other fixed charges and an amount necessary to finance a $65,613,000 rehabilitation program, at the rate of approximately $5 million per year. Approximately 67% of the total operating cost of the Long Island is made up of wages and benefits. Wages and benefits paid to employees represented by the B. R. T. increased 41%, from an average of $5,641 per year per employee in 1954, to $7,965 in 1959.

Obviously, the poor financial condition of many railroads was seriously and adversely affected by labor difficulties which the history of those years reveals were not few in number. The labor peace hoped for by enactment of the Railway Labor Act and by the efforts of the statutory Presidential Emergency Board were not fully realized.

Some strikes were conducted on a national level which, because of the economic and social results, brought into play Government action,[4] by way of seizure and injunction.

Beginning in 1950, apparently there was a shift from the national strike to the selective or the so-called "whipsaw" strike against one or a few of the railroads.

In 1950, the Firemen conducted a strike against only the Santa Fe, the Southern and portions of the Pennsylvania and New York Central.

In 1950, the Switchmen conducted a strike against only five roads for 12 days and thereafter against the Rock Is-

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[4] In 1941, a national strike set by the major railroad unions to enforce a position contrary to the recommendations of an Emergency Board was settled on the eve of the strike; in 1943 a national strike set by the railroad operating unions to enforce a position contrary to the recommendations of an Emergency Board was averted by Government seizure of the railroads; in 1946, the B. R. T. and the Engineers conducted a national strike to enforce a position contrary to the recommendations of an Emergency Board and against the Government, which had seized the railroads. After two days of complete interruption of railroad service and pending consideration of President Truman's proposal to d t the strikers into the Army, the strike was settled by granting wage increases in excess of those recommended by the Board; in 1948, a national strike of the Engineers, the Firemen and the Switchmen to enforce a position contrary to the recommendations of an Emergency Board was averted by Government seizure and an injunction obtained by the Government. *United States* v. *Brotherhood of Locomotive Engineers*, 79 F. Supp. 485 [15 LC ¶ 64,612] (D. C. D. C. 1948).

[5] "'Whipsawing' is the process of striking one at a time the employer members of a multi-employer association." *N. L. R. B.* v. *Truck Drivers Union*, 353 U. S. 87, 90 (1957).

land alone until that road was seized by the Government. *United States* v. *Switchmen's Union*, 97 F. Supp. 97 [19 LC ¶ 66,055] (W. D. N. Y. 1950).

In 1951, the Firemen called a strike against the Baltimore & Ohio, Chicago & North Western, Louisville & Nashville and Terminal Railroad Association of St. Louis which was averted by the appointment of an Emergency Board. Thereafter, the Firemen, joined by the Engineers and the Conductors, conducted a strike against a portion of the New York Central and the Terminal Rail Road Association of St. Louis. After it had continued three days, this strike was ended by Government seizure and injunction.

The effectiveness of the selective strike lies partly in the fact that since all railroads have a highly interdependent wage structure, a successful strike resulting in a change in the wages of the employees of the struck railroad eventually works a change in the wages of operating employees of other railroads, aided, of course, as all strikes are, by the fact that the railroads are required, under the Railroad Unemployment Insurance Law, to provide benefits for the strikers from a fund contributed to solely by the railroads.[6]

It was in 1959 the action was taken on a national basis through the railroads' representatives as plaintiff states it "to strengthen their collective bargaining positions with the collective bargaining representatives of their employees" by subscribing to a strike insurance plan. In March of 1958, the A. A. R. Board of Directors had requested its Law Committee to devise some plan to put the railroads on a basis that would enable them to try to bring about settlements

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[6] Under the Act, $221,514.10 was paid to B. R. T. strikers and $721,500.43 to other employees who were out of work during the strike on the Long Island in July-August, 1960.

of these cases on the basis that the emergency boards have found to be fair, a step considered by them to be in the public interest and in the interest of the railroad management.

A draft plan was drawn up and circulated to the members of the A. A. R. Board of Directors; after revision, it took the present form. Counsel for the A. A. R. then met with members of the insurance brokerage firm of Hogg, Robinson & Capel-Cure, Ltd., in London, England, to negotiate for the writing of the proposed policy which the A. A. R. attorneys had prepared. Edward S. Hogg, member of the firm of Hogg, Robinson & Capel-Cure, Ltd., recommended that the policy be written by the Imperial Insurance Company, Ltd., a corporation newly formed on behalf of Hogg and his associates under the laws of the Bahamas Islands.

On July 1, 1959, applications for policies of "Service Interruption Insurance" from Imperial were transmitted to the executives of the railroads, including the Long Island and other defendant railroads.

The Long Island thereafter submitted its application for a Service Interruption Policy, specifying a Daily Indemnity of $50,000 in response to question 3 of the application (infra), and upon the deposit of that amount in the designated bank, Barclays Bank D. C. O., Nassau, the policy was issued in Nassau. On August 17, 1959, the A. A. R. issued a press release to the newspapers announcing that the American railroads had overwhelmingly applied for Service Interruption Policies. In accordance with the terms of the policy, the insurance was issued by Imperial and became effective September 1, 1959 for all applicants, including the Long Island and other defendant railroads.

The provisions of each policy describing its operation and coverage are as follows:

"ARTICLE I. Subject to all the terms and conditions of this policy, the Company insures against loss, to the extent herein provided, directly resulting from a suspension of the Insured's operations, wheresoever conducted, caused by a work stoppage, as herein defined, commencing during the term of this policy.

"ARTICLE II. The maximum daily loss against which insurance is provided hereunder (herein called the 'Daily Indemnity') shall be the sum of $..... for the first year of this policy and for the second and third years the amount shall be as determined in accordance with the method prescribed in the application. In the event of a total suspension of Insured's operations by reason of a work stoppage, the Daily Indemnity shall be payable for each day of such total suspension (not exceeding 365 days of such a suspension caused by a single work stoppage). * * *

"ARTICLE III. Definitions—Whenever used in this policy without qualification the following terms shall have the meaning described below: * * *

"Work stoppage—The term 'work stoppage' shall mean a cessation of work by a part or all of the employees of the Insured for the purposes of enforcing demands made by one or more labor organizations on, or of resisting proposals of, a common carrier by railroad in instances (1) where such cessation of work (a) is contrary to the provisions of the Railway Labor Act or (b) is to enforce demands contrary to the recommendations of an Emergency Board appointed by the President of the United States, pursuant to the Railway

Labor Act or (c) is in resistance to the application of recommendations of such an Emergency Board, or (2) where the demands or proposals (a) are directed to or may then or thereafter affect of (b) are made by, Insured Railroads representing more than 50% of the aggregate of Insured Railroads' Daily Indemnities and such an Emergency Board has not been appointed, or, if appointed, such Board has failed to make definite findings or recommendations on the merits thereof."

We are concerned here only with the first provision of Article III—(1)(a)—(c)—since there is no dispute but that the cessation came under 1(b). The "Daily Indemnity" referred to in Article II is calculated under a formula which covers the fixed costs, such as interest on debt and the expense of supervisory and other forces, which must be met daily in order to avoid bankruptcy during a strike. It does not cover loss of profits, loss of revenues necessary to carry out rehabilitation programs, or permanent losses in traffic diverted during a strike.

Each insured road pays a minimum premium each year and pays additional premiums in an amount equal to that proportion of the aggregate of Daily Indemnities payable to insured railroads on any given day which the insured's Daily Indemnity bears to the total of the Daily Indemnities of all insured roads that are liable for the payment of additional premiums for such day. Each insured railroad is required under the Policy to deposit in a designated Bank —Barclays Bank D. C. O.—the amount of its Daily Indemnity to secure the payment of premiums.

On August 25, 1960 interest was distributed by Barclays Bank in New York to all participants in the Service Interruption Policy. Imperial Insurance Company, Limited, is not required to, nor does it, maintain any reserves with

which to pay claims for benefits under the Service Interruption Policy, except that additional premiums it receives under Article V* become a reserve for payment of appropriate claims. Holders of Service Interruption Policies pay minimum premiums yielding $150,000 per annum and this is the sole monetary benefit received by the defendant, Imperial Insurance Company, Limited, under the Policies; these minimum premiums are paid on a pro-rata basis by holders of Service Interruption Policies in proportion to the Daily Indemnities for which they applied.

On July 10, 1960, the Long Island gave notice of suspension of operations to the Imperial Insurance Company and to the Advisory Committee. The Committee, after investigation and report, determined that the strike on the Long Island was a cessation of work of the kind entitling it to receive Daily Indemnity. On July 14, 1960, the Advisory Committee sent a letter to Imperial advising that claims submitted by the Long Island were payable. The Advisory Committee computed the additional premiums that would be due under Article V of the policy and sent all policyholders a memorandum explaining how to calculate the premiums they would be called on to pay. On July 18, 1960, Imperial, having made the computation of additional premiums required by Article V(c) of the policy, mailed to each policyholder a bill for the additional premium due for the first four days of the strike. On receipt of these checks, Imperial sent to the Long Island at Jamaica, New York, a check in payment of its Daily Indemnity of $50,000 per day. As the strike continued, the Long Island gave additional notices of its claims, and they were paid by the same procedure used for its first claims.

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* Plaintiffs' Exhibit 1.

The labor dispute which led to the strike on the Long Island in July and August of 1960 arose from a B. R. T. demand for a 5-day work week in short turn-around (commuter) service without any reduction in the pay received for a 6-day week.

An agreement dated April 5, 1957, between B. R. T. and most of the railroads, providing for a moratorium on changes in wages and work rules was about to expire November 1, 1959, and for several months prior, the railroads, including the Long Island, and the B. R. T. had been negotiating on a national basis with respect to changes in the work rules. During the moratorium period and in 1958, the Long Island representative of the B. R. T. served on the Long Island a request for four rule changes. At the conclusion of the moratorium period in 1959, the same requests were again served along with eight other demands; the railroad countered with twelve rule changes.

The primary issue, however, was the five-day work rule. A conflict then developed over the right of the B. R. T.'s Long Island representative to bargain on behalf of the B. R. T. as to the other overlapping demands which necessitated national handling. While this question was unresolved, the B. R. T. called a strike against the Long Island for December, 1959; a postponement was obtained through the National Mediation Board and bargaining resumed. Efforts to reach a settlement proving fruitless, the National Mediation Board requested that the parties submit to arbitration. The Long Island consented; the B. R. T. refused and a new strike date of April 25, 1960 was set. On April 18, 1960, an Emergency Board was created by the President; the B. R. T. refused to cooperate with the Presidential fact finders and refused to accept the recommendation of the Board that they withdraw their demands. The

B. R. T. set a new strike date of June 19, 1960; and refused to settle the dispute at the Long Island's suggestion on an even more favorable basis than the Board had suggested. On July 10, 1960, the B. R. T. began its strike against the Long Island resulting in a complete shutdown until August 3, 1960.

The B. R. T. rejected further recommendations of a New York State Board of Inquiry, which the Long Island had accepted but, finally the strike was settled. Under this settlement, the B. R. T. obtained the 5-day week in short-turn-around service at a net additional cost to the Long Island of $162,041 per year over and above the cost of the increased wages and other benefits received by the B. R. T. as a result of the national agreement which had become effective only six weeks before, on June 22, 1960.

During the period of the strike, the B. R. T. paid out a total of over $158,121 in strike benefits to which was added about $943,014 benefits paid out by railroad boards to the strikers and nonstrikers; a total of benefits amounting to $1,101,136; while the Long Island Railroad collected about $1,300,000 strike insurance.

Plaintiff's argument in support of its contention that the strike insurance plan is illegal *per se* proceeds as follows:

1. Defendant Long Island was operating at a deficit.

2. Under the strike insurance plan, it could collect up to $50,000 a day which was in excess of its operating expenses.

3. Therefore, it was more profitable for it to cease operation than to continue to operate.

4. Such a situation was, as a matter of law, incompatible with a bona fide effort to settle its dispute.

5. And resulted in a *per se* violation of the obligation imposed by the Railway Labor Act to bargain in good faith in an attempt to reach a settlement.

6. And in addition the Long Island was obligated to represent the interests of the other participating carriers in its bargaining.

7. All of which resulted in a further violation of the alleged duty imposed in the carrier not to bargain on an industry-wide basis without the Union's consent.

We put aside for the moment the erroneous statements and conclusions drawn by plaintiff to discuss at the outset the applicable law.

There is no provision in the Railway Labor Act outlawing or permitting strike insurance. This, however, is of no significance since the purpose of the Act is to set up procedures to avert interruption to commerce, not to prescribe or proscribe the labor activities of parties.[1] *Terminal R. R. Ass'n* v. *B. R. T.*, 318 U. S. 1, 6 [6 LC ¶ 51,154]. However, the Clayton and Norris-LaGuardia Acts do enumerate what are lawful activities and what are the respective duties of labor and employer and among these activities, they specifically enumerate: the obtaining and communicating of information and the paying of strike benefits to any person engaged in a labor dispute.[2]

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[1] Thus, the Act provides for the services of a National Mediation Board, then for arbitration, then for a Presidential Emergency Board, all agencies concerned with helping the parties reach an agreement in order to avoid a national emergency by an interruption of commerce.

[2] Under the Clayton Act, Section 20, 29 USC Sec. 52, these activities include: (1) "peacefully obtaining or communicating

Then, too, we have the recent holding of the Supreme Court that "there is simply no inconsistency between the application of economic pressure and good-faith collective bargaining"; even though the economic pressure applied is an activity unprotected by the Labor Management Relations Act (*N. L. R. B.* v. *Insurance Agents*, 361 U. S. 477, 494-495 [39 LC ¶ 66,239] (1960)).

While there the duty found not to have been violated was that imposed on the Union under Section 8(b)(3) of the Labor Management Relations Act (29 U. S. C. A. 158(b)(3)) "to bargain collectively"; and here the duty charged to have been violated is that imposed on all parties to "exert every reasonable effort to make and maintain agreements" under the Railway Labor Act (45 U. S. C. 152), the nature of the obligation is essentially identical: to bargain in good faith. The principle laid down—that the use of economic pressure is "part and parcel of the process of collective bargaining" (p. 495, *supra*) and no *per se* violation of that duty—is clearly applicable to a determination of whether there was any such violation here and bars any attempted differentiation because of the different statutes involved.

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information . . . ; paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; . . . " and under Sec. 4 of the Norris-LaGuardia Act (29 USC Section 104):

"'(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value; . . .

(d) . . .

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any method not involving fraud or violence; . . .

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; . . . "

That there would be no *per se* violation by reason of the strike insurance benefits here paid, is all the more apparent when we realize that the holding in the *Insurance Agents'* case was in the face of conduct which the Court characterized as "disloyal tactics" designed to "harass" the employer and, unlike the conduct here, not protected by any labor statute.

Here, the so-called weapon used is one expressly protected by two statutes and one consistently employed by labor with no accusation of disloyal or harassing conduct.

Underlying the Court's rejection of any taint of illegality in the use of economic force was an explicit recognition of a positive benefit to be derived from the use of such weapon in reaching peaceful settlement and promoting the labor laws in general. If the sort of conduct there engaged in was held to strengthen the collective bargaining process by supposedly equalizing respective bargaining positions, how much more so does the availability of strike insurance, which may operate to prevent unreasonable demands being made upon one who might have to capitulate because of financial exigencies with no opportunity to bargain on an equal basis. It is this precise reason which has prompted unions to provide strike insurance funds, and employers now to desire them. The recognition of the Court that economic pressure is "a prime motive power for agreements in free collective bargaining" (p. 477) dispels the argument that the result of such insurance flies in the face of the purpose of the Act "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions. . . ."

That the insurance served to promote the purposes of the Railway Labor Act is further evidenced by the provision in the policy that benefits became payable only if the

work stoppage was contrary to the provisions of the Railway Labor Act or to enforce demands contrary to or in resistance of the recommendations of a Presidential Emergency Board. This provision operates to encourage resort to the procedures of the Act and to make it less likely that the union will refuse to comply with the Board's recommendation and will refuse to accept the procedure set up by Congress to avert a strike.

Consistent with its contention that strike insurance constituted a *per se* violation, plaintiff has maintained throughout that evidence of the conduct of the parties in their negotiations is irrelevant to a decision on the legality of the insurance. But we hold this evidence to be highly relevant and we have considered it on the question of defendant's motive in subscribing to the insurance plan as well as on the effect of the plan itself. Indeed, it has been contended by plaintiff that the plan made it more profitable for defendant to cease operating than to attempt to adjust the demands of its employees.

The holding of the Supreme Court that economic duress does not exclude good faith bargaining as a matter of law rested upon a finding that the union accused of employing the economic force had and was negotiating with the employer at the time of the use of such duress. It appeared that these negotiations lasted over a period of six months before a new contract was reached and that, although economic retaliation was going on outside the conference rooms, it was part and parcel of the collective bargaining system.

Certainly, if defendant Long Island had refused to enter into any negotiations or to make any effort to meet with plaintiffs with a view to settling their differences, it would be in violation of its duty under the Act, irrespective of the availability of strike benefits. However, it does not follow

that, because the "strike insurance" may have assisted the railroad in resisting the B. R. T. demands for a period while negotiations were being had, the entire strike insurance arrangements were unlawful.

The strike insurance plan was not a violation of defendant's duty to bargain in good faith; indeed, it might well be viewed as an attempt by the railroad to follow the procedures of the Act in an effort to reach a peaceful settlement and to avert a strike.

It appears from the record that the Long Island made a series of counter-proposals to the union in the course of the bargaining; that it accepted the Mediation Board's proffer of arbitration; that it accepted the recommendations of the Presidential Emergency Board and then offered to settle on a basis more favorable to the union than the recommendations of the Board; that twice it accepted proposals by New York State authorities to submit the dispute to arbitration; and that it agreed to the proposal of the Governor of New York which granted the five-day week over and above the increased wages received by the B. R. T. as a part of the national wage scale, thus putting an end to the 26-day strike.

Plaintiffs have failed to establish that there was any violation of the carrier's duty to bargain in good faith under the first section of the Railway Labor Act.

Plaintiffs charge that defendant also violated the Railway Labor Act in that "by entering into the strike insurance plan, it introduced an element of multiparty bargaining without the consent of plaintiffs", thus violating the provision of Section 2 of the Act that the bargaining is to be between "parties to the dispute." This contention rests on the erroneous factual premise that the Long Island by receiving strike benefits to which other railroads had contributed was being financed to represent an industry-

wide point of view and the interests of others instead of only its interest vis-a-vis plaintiffs; and on the additional erroneous legal premise that the Act forbids railroads to associate for the purpose of collective bargaining.

The insurance policy imposes no obligation on defendant requiring joint action or decision. In fact, it negates any such suggestions by specifically providing that "the insured shall be free at any time, without prejudice to this insurance, to make with the labor organization or organizations concerned an agreement that results in a termination of such work stoppage." The Long Island's right to insurance payments in case of work stoppage covered by its policy was in no way dependent upon the popularity of the Long Island's bargaining position with other railroads.

The record shows that, at no time, was anyone but the Long Island conducting the bargaining through its own officers and for itself alone.

The counter offers made by the Long Island during the bargaining, its receptiveness to the recommendation of the Emergency Board, its willingness to submit the dispute with plaintiffs to arbitration, refute any contention that other roads controlled the Long Island in its bargaining under the Railway Labor Act.

No prohibition against organizing can be inferred from any provision in the Act and it is expressly provided that the term "representative" means "any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them," Section 151 (Sixth), 45 U. S. C. A. The only qualification imposed on the designation of a representative is that the representative be selected freely and independently by the group which he represents. *Airlines Negotiating Conference Agreements*, 8 CAB 354.

Because of the coordinate economic interests of the nation's railroads and their interdependence on one another, almost of necessity they have developed industry-wide wage and rule patterns and maintained a balance in the wage increases of the various employee groups within each railroad. Multi-carrier bargaining of labor demands referred to as regional and national handling, has been and is (since the Act) the customary method of collective bargaining. This has been recognized by the plaintiffs; its constitution empowers its national organization to carry on collective bargaining.

The most literal statutory violation upon which the plaintiff relies is the anti-pooling provision of the Interstate Commerce Act (49 U. S. C. 5).[9] It is undisputed that there was no Interstate Commerce Commission approval of the insurance plan, and that the premiums paid by the Long Island to the Imperial Insurance Company came out of moneys collected from passenger fares and freight charges.

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[9] "§ 5. Combinations and consolidations of carriers.

(1) Pooling; division of traffic, service, or earnings.

Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; * * *".

And for a violation of this provision, the statute (Section 8) provides that:-

"such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery. * * *".

The strike insurance, plaintiff argues, has all the characteristics of an illegal pool in that it was a contract to divide a part of the earnings of the several participants (under the guise of premiums) with a resultant reduction of competition among them—"without attempting to obtain the specific approval of the ICC as required by the laws of the United States." (49 U. S. C. 5(1).)

Plaintiff, however, recognizes that, while Section 5(1) empowers the Commission to exempt pools from the prohibition of the statute which it determines will not unduly restrain competition and will result in better service to the public or economy in operation, the broad sweep of the section does not encompass pools whose sole concern is labor-management relations.

The legislative history of this provision of the Interstate Commerce Act leaves no doubt that its purpose and need was to prohibit a well-defined type of anti-competitive arrangement, which had become widespread in the railroad industry. The evil had been found in arrangements between railroads to suspend competition by apportioning the business and dividing the pooled earnings in fixed percentages. That this was the purpose of the section is quite evident and has been noted in numerous decisions, both of the Courts and the Commission. (See *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *Norfolk Southern Bus Corp.* v. *Virginia Dare Transp. Co.*, 159 F. 2d 306; *Atlantic Greyhound Corp. Pooling*, 37 M. C. C. 543.)

In short, Section 5(1) deals with arrangements between competing railroads to apportion business, and has no application to payments made for strike insurance. Such arrangements and activities have been held not to violate any law of the United States. (*United States* v. *Hutcheson*, 312 U. S. 219 [3 LC ¶ 51,110].)

Lastly, says plaintiff, the plan is a "pooling of resources" by competitors "for the purpose of supporting work stoppages"—illegal under the Anti-trust Acts which "are concerned with regulating monopolistic powers that come from combinations of economic ownership." The specific antitrust violation charged is an attempt by the railroad industry "to rig the price which it will pay for the essential ingredient of labor", in contravention of the Sherman Act. (15 U. S. C. A. 1.) The answer to this is plaintiff's own quotation from the Clayton Act, 15 U. S. C. 17, that, for purposes of the antitrust laws, "the labor of a human being is not a commodity or article of commerce", and the express holding of the Supreme Court in *Apex Hosiery* v. *Leader*, 310 U. S. 469, 495 [2 LC ¶ 17,063], that INTERRUPTION of commerce arising out of a bona fide labor dispute does not come within the Sherman Act. (See also *Schatte* v. *International Alliance*, 182 F. 2d 158 [18 LC ¶ 65,768].)

None of the activities attacked by plaintiff, including the strike insurance program and the public relations activities of defendants, did place, or could place, any restriction on commercial competition in the market for any goods or services. *Eastern R. R. Pres. Conf.* v. *Noerr Motor*, 365 U. S. 127. The *sine qua non* of the condemnation of the Sherman Act "restraint on commercial competition" is totally lacking in the case.

At the outset and solely for purposes of the discussion of the legal questions raised by plaintiff, we assume without contradiction that the activities charged against defendants were as characterized by plaintiff. Because these characterizations and interpretation of the policies have formed the basis of its charges of illegality, we make the following findings and comments.

The insurance is said by plaintiff not to be the usual type of insurance which spreads and cushions economic loss "because of events that are without the control of the insured" but is in form one which is against public policy in that benefits "can be turned on or off at the will and judgment of the insured". A reading of the policy and the actual operation of the plan with respect to the Long Island is sufficient to demonstrate that plaintiff's interpretation is without support in fact. The benefits were paid to the Long Island because of events without its control—"a cessation of work by the employees of the insured to enforce demands contrary to the recommendations of an Emergency Board appointed by the President of the United States, pursuant to the Railway Labor Act."

Plaintiff further states that the legal relationship created was not that of an insurance company with several insured carriers and that a railroad's payment to Imperial was not a true insurance premium because it was not a fixed consideration in return for the assumption of each carrier's risk of loss due to strikes.

The plan presents a form of mutual insurance conditioned upon the taking of similar policies by a stated percentage of the insured class, and payment of premiums corresponding with the losses suffered by the members of the insured class. The members in effect insure one another. Under this form of insurance, the risk is transferred to all the members of the class so that upon the happening of the contingency insured against to one of the members of the class, the individual financial loss is distributed over the whole class. The loss is not eliminated as plaintiff argues, but rather it is redistributed among the class from whom must then be collected an aggregate sum equal to the total of the losses and expenses. The

sum is collected by way of assessment on each member in proportion to the amount of their policies. Naturally, if the relationship continues for any length of time, the one whose loss has been redistributed pays back all he has received and the expense attributable to his indemnification since, when the next contingency occurs to another, he is assessed.

No temptation to cause loss is held out by the payment of the daily indemnity since all that this payment covers is fixed costs which must be met daily in order to avoid insolvency. This daily indemnity payment, as we have mentioned, does not cover loss of profits, loss of extra revenues for rehabilitation and improvement, or loss of traffic.

The Long Island Railroad, as a Redevelopment Corporation, operated under a plan which provided for revenues for rehabilitation as well as for its operating expenses. Therefore the strike—forgetting for the moment the fact that the Long Island would be assessed to cover the next loss befalling another of the carrier members by reason of a strike—was "far from economically advantageous" since the Long Island lost revenues necessary to its rehabilitation; plus diversion of passenger and particularly freight traffic which to an extent it could never hope to recoup. Finally, the daily indemnity received covered only the "daily" expenses incurred by a railroad under conditions of total suspension of operation with no additional allowance to put the property in condition as to effect resumption of services at the end of the strike stoppage.

From the tortured and strained construction given by plaintiff to the insurance policy in suit, the statutes relied on and the conclusions attempted to be drawn from plaintiff's interpretation, the real complaint emerges (described

in plaintiff's own words): that the railroads have attempted to eliminate "the inevitable financial loss involved in a work stoppage", and that this adversely affected plaintiff's economic position in its efforts to secure its demands from the industry.

The strike insurance plan offends none of the statutes cited; it is found to be lawful and the complaint is dismissed with costs. Let judgment be so entered forthwith by the Clerk.

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 322—October Term, 1962

(Argued May 6, 1963 Decided June 14, 1963)

Docket No. 27989

W. P. KENNEDY, as President of the Brotherhood of Railroad Trainmen, etc., *et al.*,

Plaintiffs-Appellants,

v.

THE LONG ISLAND RAIL ROAD COMPANY, etc., *et al.*,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge*,
KAUFMAN and MARSHALL, *Circuit Judges*.

Appeal from a judgment of the District Court for the Southern District of New York, Sylvester J. Ryan, Chief Judge, dismissing complaint alleging the invalidity under the Railway Labor Act, 45 U. S. C. §§ 151 et seq., the Interstate Commerce Act, 49 U. S. C. § 5(1), and the Sherman Act, 15 U. S. C. § 1, of the Service Interruption Insurance Policy adopted by defendant railroads.

Affirmed.

KAUFMAN, *Circuit Judge*:

The question presented to us on this appeal is the legality under the Railway Labor Act, 45 U. S. C. §§ 151 et seq., the Interstate Commerce Act, 49 U. S. C. § 5(1), and the Sherman Act, 15 U. S. C. § 1, of the Service Interruption Policy or so-called strike insurance plan adopted by the railroad industry.

Chief Judge Ryan, in the court below, tried the issue of liability and reserved for jury consideration, should it prove necessary, the question of damages. With two lengthy depositions and an agreed statement of facts before him, Judge Ryan held that the industry's strike insurance plan runs afoul of none of the above-mentioned statutes. 211 F. Supp. 478 (S. D. N. Y. 1962). He therefore dismissed the complaint of the Brotherhood of Railroad Trainmen (B. R. T.) and its officers against, *inter alia*, the Long Island Rail Road Company, twenty-two other railroads participating in the insurance plan, and the Association of American Railroads (A. A. R.).[1] That complaint sought damages totalling roughly $3,400,000.00 (to be trebled for purposes of the claim under the Sherman Act) for injuries allegedly incurred by the union during its strike of the Long Island Rail Road for twenty-six days in July and August of 1960, injuries which are claimed to have resulted from the "conspiracy and unlawful agreement" consummated by the defendants.

We hold appellants' claim that the strike insurance plan before us constitutes a *per se* violation of the Railway

[1] Membership in the A.A.R. is open to all rail carriers. The Association deals with matters which are of common concern to railroads in the fields of operations, maintenance, engineering, research, purchases and stores, accounting and finance, valuation, taxation, law and legislation, transportation economics, and relations with the public. See Agreed Statement of Facts (Trial Exhibit 1, ¶ 48).

Labor Act, the Interstate Commerce Act, and the Sherman Act to be wholly without merit, for the reasons so thoroughly set forth in the comprehensive opinion of Judge Ryan. We therefore affirm his judgment dismissing the complaint.

The importance of the issue presented in this case, however, warrants additional comment. We shall not repeat in detail the facts fully set out in Judge Ryan's opinion, 211 F. Supp. at 480-86, but shall assume familiarity with them. In essence, the strike insurance plan represented the reaction of the nation's leading railroads to the combined effects of economic distress and selective strike tactics (known as "whipsawing") by the unions. Economic distress was strikingly evident in the year 1959, when the return on investment of the average road was 2.72%, and that of the Long Island Rail Road, 0.72%. The Long Island's principal source of income flows from its 54 million commuter passengers annually, and its predominating element of costs (approximately 67% of its total operating cost) is the wages and benefits paid to employees represented by the appellant B.R.T.; such wages and benefits averaged nearly $8,000 per employee in 1959, an increase of 41% in five years. One of the reasons assigned for the union's success in securing such increases on a nationwide scale in the past decade is its use of the "whipsaw" strike, in which the strike effort is directed at a single railroad; concessions extracted by the union in a single case, it is suggested, soon become predominant throughout the country, because of the highly interdependent wage structure of the railroad industry. The harsh economic impact upon the striking employees is cushioned by strike benefits which emanate from a fund to which all railroads are required by law to contribute.

The railroads sought to ameliorate their plight by subscribing to an insurance program which, by supplying a limited amount of funds to roads hit by a certain limited class of strikes, was expected to strengthen their bargaining position and render less economically drastic the effects of a work stoppage. In 1959, after consultations within the Law Committee of the A.A.R. and after making financial arrangements with a London insurance brokerage firm and its newly formed insurance company in the Bahamas, the railroads became subscribing parties to a "Service Interruption Policy." A policy was issued to the Long Island Rail Road upon its deposit of $50,000, specified as its Daily Indemnity; this figure, composed of the average daily fixed costs of the Long Island represented not only its initial deposit but also the amount which would be paid to it daily should it be confronted by a work stoppage as defined in the policy. A similar initial deposit, based upon daily fixed costs, was made by each of the subscribing roads. These premiums constituted the fund from which the strike insurance proceeds were eventually to be paid, and as proceeds were in fact paid out, the fund was supplemented by further pro rata deposits by the non-struck roads during any given strike period.

A "work stoppage" is defined in the insurance contract as

> "a cessation of work by a part or all of the employees of the Insured for the purposes of enforcing demands made by one or more labor organizations on, or of resisting proposals of, a common carrier by railroad in instances (1) where such cessation of work (a) is contrary to the provisions of the Railway Labor Act or (b) is to enforce demands contrary to the recommendations of an Emergency Board appointed

by the President of the United States, pursuant to the Railway Labor Act or (c) is in resistance to the application of recommendations of such an Emergency Board."

and also, not relevant to the case before us, a cessation of work in which the union's demands affect railroads paying 50% of the premiums and an Emergency Board has not been appointed or has failed to make findings or recommendations. Insurance proceeds are to cover only fixed costs suffered during the course of the strike: property taxes, interest charges on debt, payments toward sinking funds and equipment-purchase obligations, pensions and payments into pension funds, and the expense of supervisory and other forces necessarily incurred during the work stoppage. Such proceeds do not cover the railroad's loss of profits, loss of revenues necessary to carry out rehabilitation programs, or permanent losses resulting from diversion of traffic to alternative roads or alternative forms of transport.

The union demand which precipitated the strike of July and August 1960 centered principally upon the wages and hours of its employees engaged in short turnaround or commuter service; the B. R. T. demanded a reduction of the work week from six days to five days, without any reduction in pay. A strike against the Long Island was set for December 1959 but was postponed when the National Mediation Board intereeded in order to encourage further bargaining regarding the terms of a new collective agreement. Bargaining having failed, the Board requested that the parties submit to arbitration; the Long Island consented, but the B. R. T. refused and set a new strike date. A week before that date, the President appointed an Emergency Board, which made findings and recommended

that the union withdraw its demands; again, the B. R. T. refused to comply. Further concessions were made by the Long Island (see footnote [3]), none of which were satisfactory to the B. R. T. The strike began on July 10, 1960 and continued until August 3, during which period the railroad was completely shut down.

Since the B. R. T.'s work stoppage fell within the definition in the Service Interruption Policy, the Long Island received its $50,000.00 daily indemnity for each day of the strike, totalling $1,300,000.00. From the fund contributed by the railroads themselves in accordance with law, strikers and non-strikers received approximately $943,014; the B. R. T. itself paid out more than $158,121, for a total of $1,101,136.00 received by railroad employees during the 26-day walkout.

It is appellants' contention that the strike insurance plan adopted by the railroads undermines the federal policies which lie at the heart of our labor and antitrust laws. We find this contention thoroughly unconvincing. The most critical defect in the appellants' argument before this Court is their misunderstanding as to the nature of a so-called *per se* statutory violation. They argue that the participation of the defendants in the Service Interruption Insurance program constitutes a *per se* violation of the Railway Labor Act, the Sherman Act, and the Interstate Commerce Act and that, in determining this question, the trial court should have excluded all evidence regarding the actual operational effects of the plan as well as the actual course of strike settlement negotiations between the representatives of the Long Island Rail Road and its employees. They assert that "the only evidence which would be relevant * * * would be (a) the strike insurance plan itself and (b) the *theoretical* operational effect of the plan insofar as it *might* impinge upon competition or any statutory

duties imposed on the railroads * * *" (Emphasis added). Thus we are told, as an illustration, that since, in certain conceivable circumstances, insurance proceeds may be so great as to render it more profitable for a struck railroad to acquiesce in a shutdown than to conduct normal operations, the plan is in effect an inducement for the railroad to abstain from collective bargaining; it follows from this, runs the argument, that the strike insurance plan constitutes a *per se* violation of section 152 of the Railway Labor Act, 45 U. S. C. §152, which imposes upon all carriers the duty "to exert every reasonable effort to make and maintain agreements * * * and to settle all disputes, * * *." Other specters are conjured up in order to convince us of the necessarily pernicious quality of the railroads' agreement.

This analysis is founded upon a gravely erroneous premise. For surely the concept of *per se* illegality was not devised in order to lead us down the path once trod by Alice in her journey through the looking glass. That principle is to be applied only to conduct which *of necessity* produces consequences violative of the statute under consideration, see Report of the Attorney General's National Committee to Study the Antitrust Laws 11 (1955), or produces proscribed consequences in such an overwhelming proportion of the cases that minute inquiry in every instance would be wasteful of judicial and administrative

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[1] It is interesting, although by no means relied upon by us as probative evidence, that the Chairman of the Railway Labor Executive Association, which filed a brief amicus curiae in support of the appellants, is reported to have said, quite to the contrary of the position espoused here, that strike insurance is not "going to be worth a damn to the railroads." He is said to have added that the railroads "cannot afford to have a strike of any duration * * * even if they're collecting strike insurance." Railway Age, August 29, 1960, p. 9.

resources see *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397-98 (1927). Appellants have completely failed to establish that participation in the strike insurance plan will necessarily have the serious effects they predict.

Only recently the Supreme Court has spoken on a question analogous to that before us, in *National Labor Relations Board* v. *Insurance Agents' International Union*, 361 U. S. 477 (1960). In that case, the employer branded as a *per se* unfair labor practice certain harassing tactics sponsored by the union which were avowedly adopted in order to put economic pressure upon the employer during the course of contract negotiations. The Court upheld the use of economic weapons as "part and parcel" of the system established by our labor laws, 361 U. S. at 489, and held that "there is simply no inconsistency between the application of economic pressure and good-faith collective bargaining," 361 U. S. at 494-95. It emphasized, further, that lack of good faith is to be inferred principally from "the union's performance at the bargaining table," 361 U. S. at 490. It is noteworthy that in his concurring opinion, Justice Frankfurter demonstrated that the cases usually cited in support of the concept of *per se* bad-faith bargaining do not in fact support that proposition, 361 U. S. at 498-10, and stated that a case involving a charge of bad faith turns upon whether "in the context of *all its circumstances*, the respondent has engaged in bargaining without the sincere desire to reach agreement which the Act commands," 361 U. S. at 504 (emphasis added). In language quite relevant to the case before us, he declared:

> "* * * in determining the state of mind of a party to collective bargaining negotiations the Board does not deal in terms of abstract 'economic pressure.' It must proceed in terms of specific conduct which it

> weighs as a more or less reliable manifestation of the state of mind with which bargaining is conducted."

361 U. S. at 505.

We are thus impelled to the conclusion that, in a case such as this, the railroad's good faith in the bargaining process should depend principally upon the conduct of the railroad's representatives at the bargaining table; this may, in turn, be viewed against such circumstances as any history of employer animus toward the union, the extent of insurance coverage (for example, whether there is reimbursement of only fixed costs, as here, or of lost profits as well) and its relationship to the economic needs of the road in the face of a protracted business interruption, and the availability and extent of economic pressures exerted by the union (such as strike benefits for the striking employees) as an index of the union's capacity to withstand the work stoppage. Judge Ryan was therefore correct in receiving evidence of the history of bargaining negotiations, 211 F. Supp., at 485, 488,[3] and in concluding that the strike insurance plan, far from constituting a violation of the railroad's duty to bargain in good faith, was an instrument of self-help properly employed in the process of collective bargaining.[4]

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[3] "It appears from the record that the Long Island made a series of counter-proposals to the union in the course of the bargaining; that it accepted the Mediation Board's proffer of arbitration; that it accepted the recommendations of the Presidential Emergency Board and then offered to settle on a basis more favorable to the union than the recommendations of the Board; that twice it accepted proposals by New York State authorities to submit the dispute to arbitration; and that it agreed to the proposal of the Governor of New York which granted the five-day week over and above the increased wages received by the B.R.T. as a part of the national wage scale, thus putting an end to the 26-day strike."

[4] It cannot be overlooked that the payment of proceeds under the strike insurance plan is a purely defensive measure and is

It is interesting to note, in passing, that appellants quite properly justify the payment of more than $1,100,000.00 in strike benefits to the striking employees by relying upon Congress' specific declaration that the payment of benefits to employees during a labor dispute is not to be deemed a violation of any federal law and shall be immune from injunction in the federal courts. See section 20 of the Clayton Act, 29 U. S. C. §52,[5] and section 4 of the Norris-LaGuardia Act, 29 U. S. C. §104.[6] The parties in this case do not challenge the use of employee strike benefits as a union shield for the purpose of withstanding the adverse economic effects of a strike—as well as a club in the union's pressure arsenal—designed to bring about an early and favorable settlement. Yet, by some obfuscated reasoning, the appellants insist that the same economic benefits, when

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triggered only by a narrowly circumscribed class of strike activity, *i.e.*, to the extent relevant, strikes contrary to the provisions of the Railway Labor Act, and strikes in resistance to or for the purpose of enforcing demands contrary to the recommendations of an Emergency Board appointed by the President. Compare cases upholding multi-employer lockout agreements, *NLRB* v. *Truck Drivers Union*, 353 U. S. 87 (1957); *Cluett* v. *Publishers' Association*, 314 F. 2d 343 (2d Cir. 1963), affirming, on the opinion of the District Judge, 214 F. Supp. 520 (S. D. N. Y. 1963); *American Brake Shoe Co.* v. *NLRB*, 244 F. 2d 489 (7th Cir. 1957).

[5] "* * * no such restraining order or injunction shall prohibit any person or persons * * * from paying or giving to * * * any person engaged in such dispute, any strike benefits or other moneys or things of value; * * * nor shall any of [these] * * * acts * * * be considered or held to be violations of any law of the United States."

[6] "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from * * * paying or giving to * * * any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value * * *."

accruing to the employer who participates in the strike insurance plan before us, should be outlawed on the theory that they strike at the very vitals of the bargaining provisions of the Railway Labor Act.

We find support for the conclusion we reach today in a recent and authoritative decision of the Civil Aeronautics Board. The Board, upholding the validity of the so-called mutual aid pact adopted by the major airlines and quite similar to the strike insurance plan before us, noted:

> "The agreement, although increasing management's abilities to withstand the economic impact of strikes in the same manner that union strike benefits cushion the economic effect on employees, does not purport to affect the carriers' duties under the Railway Labor Act to bargain in earnest. Nothing presented by the parties shows that the operation of the agreement will, in fact, induce the carriers to disregard the obligations imposed by law. Neither matters of record nor fair inferences to be drawn therefrom justify a finding that the agreement will constitute an impediment to *bona fide* collective bargaining."

Six-Carrier Mutual Aid Pact, 29 C. A. B. 168, 171 (1959).[7]

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[7] The appellants' contention, again purely speculative, that the strike insurance plan improperly introduces an element of multi-employer bargaining into railroad labor relations, is amply discussed and refuted by Judge Ryan, 211 F. Supp. at 488. Cf. *Six-Carrier Mutual Aid Pact*, 29 C. A. B. at 172-73.

Having decided, on the merits, that the strike insurance plan does not constitute a *per se* violation of the Railway Labor Act, we find it unnecessary to determine whether any such violation could possibly give rise to an action for damages. See *Louisville & N. R. R. v. Brown*, 252 F. 2d 149, 155 (5th Cir.) (no statutory right of action for damages for breach of duty to exert all reasonable effort to settle dispute), cert. denied, 356 U. S. 949 (1958).

We next address ourselves to appellants' assertions that the strike insurance plan constitutes a *per se* violation of the Sherman Act and of a similar but more specific proscription within the Interstate Commerce Act. These assertions must also fail, for the fundamental reason that the named statutes were designed principally to outlaw restraints upon commercial competition in the marketing and pricing of goods and services and were not intended as instruments for the regulation of labor-management relations.

Even were we to assume that the strike insurance plan in some way was the "cause" of an interruption in interstate commerce, the Supreme Court has clearly stated that "the Sherman Act * * * does not condemn all combinations and conspiracies which interrupt interstate transportation," *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 486 (1940), and that "the end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services," 310 U. S. at 493, 495, 501, 513. Surely it cannot be said that the instant form of railroad cooperation in combatting the risks of labor unrest effects an unnatural and anticompetitive regulation of the pricing, supply, or distribution of goods or services.[*] Ap-

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[*] Compare *Six-Carrier Mutual Aid Pact*, 29 C. A. B. at 175: "* * * we cannot conclude that the financial assistance provisions of the agreement will substantially lessen competition within the air transportation industry. The commercial advantages of building goodwill and permanently capturing diverted traffic mitigate against any dampening of competition between operating signatory carriers."

In a recent case involving an agreement among newspaper publishers to suspend publication in the event of a "whipsaw" strike, wherein the union alleged a *per se* violation of the Sherman Act, the court stated:

"It is well to note that this agreement (1) does not fix prices; (2) does not allocate territorially the sale or dis-

pellants urge, however, that the price of *labor* is artificially manipulated whenever a railroad is permitted to avail itself of the proceeds of strike insurance. The answer lies in the clear language of section 6 of the Clayton Act, 15 U. S. C. §17: "The labor of a human being is not a commodity or article of commerce." As an outstanding scholar in the field of labor law has noted: "No one seriously suggests that antitrust policy should be concerned with the labor market per se." Cox, "Labor and the Antitrust Laws —A Preliminary Analysis," 104 U. of Pa. L. Rev. 252, 254 (1955).[9]

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tribution of newspapers; (3) does not preclude the establishment of competing journals in the New York area; (4) does not provide any discrimination between the would-be purchasers of any newspapers; (5) involves no control of advertising." 2

Cluett v. *Publishers' Association*, 214 F. Supp. 520, 524 (S. D. N. Y.), affirmed on the opinion of the District Judge, 314 F. 2d 343 (2d Cir. 1963).

[9] The cases cited by appellants in support of the contention that the labor of a human being is a "commodity" within the Sherman Act when trafficked in by persons other than labor unions clearly do not support their position. These cases merely hold that the act is violated when businessmen engage with a union in, or use the guise of the union for the purpose of, controlling the prices or allocating the market for their goods. See, *e. g.*, *Los Angeles Meat Drivers Union* v. *United States*, 371 U. S. 94, 97 (1962); *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 399 (1947); *Allen Bradley Co.* v. *Local* 3, *IBEW*, 325 U. S. 797, 800, 809-10 (1945).

We do not decide whether appellants have the requisite standing to challenge the strike insurance plan under the antitrust laws. See *Cluett* v. *Publishers' Association*, 214 F. Supp. at 525:

> "The reason plaintiffs are affected is not that trade or commerce among the several states is restrained, but because the economic pressure of employers against employees affects their employment * * *. [I]n order to state a cause of action under the anti-trust laws, a plaintiff must show * * * that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry, otherwise he is not injured by reason of anything forbidden in the anti-trust laws."

Finally, the claim of violation of the Interstate Commerce Act is no more persuasive. Section 5(1) of the act, 49 U.S.C. § 5(1), provides: "Except upon specific approval by order of the Commission * * * it shall be unlawful for any common carrier * * * to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof * * *." We believe this section to be an expression of transportation policy solely, and not of labor policy. Thus, at the time the act was passed, "pooling" was defined as

> simply an understanding or agreement among the roads that each shall take a certain proportion of the business of the territory they compete for, and in the event of their not being able to divide the business physically, they equalize the disadvantages by dividing profits.

See S. Rep. No. 46, 49th Cong., 1st Sess., Appendix p. 153 (1886). It may be true that the collection of premiums and payment of proceeds to a struck railroad might be viewed literally as the "division * * * of gross or net earnings," since contributions to the insurance fund were from the passenger and freight revenues of the participating roads. But so too are their contributions to the A. A. R., a trade association (see footnote) whose expenses are met by assessments from its members in proportion to their operating revenues. But we do not understand the appellants to contend that the mere existence of the A. A. R. or of any other trade association in the transportation industries ahead of the anti-pooling provisions of the Interstate Commerce Act and as a manifestation of the Sherman Act. Simply put, the strike insurance plan does not represent

an attempt to apportion business among competing railroads on a basis other than individual performance. Its validity under the Interstate Commerce Act §5(1) can thus hardly be doubted.[13]

Since we have found no violation of the Railway Labor Act, the Sherman Act, or the Interstate Commerce Act, there is no need to consider whether, as contended by appellees, their strike insurance plan is expressly rendered lawful by section 20 of the Clayton Act and section 4 of the Norris-LaGuardia Act (see footnotes [5] and [6]), or whether those statutes were meant to shelter only those strike-benefit programs adopted by labor. See *Cluett v. Publishers' Association*, 214 F. Supp. 520, 528-29 (S. D. N. Y.), affirmed on the opinion of the District Court, 314 F. 2d 343 (2d Cir. 1963).[14]

Judgment affirmed.

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[13] There was thus no need for the participating railroads to secure the prior consent of the Interstate Commerce Commission; 49 U. S. C. § 5 (1). The submission for approval to the Civil Aeronautics Board of the airlines' mutual aid pact was apparently dictated by statutory language considerably broader than that of the anti-pooling provision of section 5 (1) of the Interstate Commerce Act. See section 412 of the Federal Aviation Act, 49 U. S. C. § 492:

> "Every air carrier shall file with the Board a true copy . . . of every contract or agreement . . . affecting air transportation . . . between such air carrier and any other air carrier . . . for pooling or apportioning earnings, losses, traffic, service, or equipment . . . or for preserving and improving safety, economy, and efficiency of operation, . . . or for other cooperative working arrangements."

[14] *But see Brotherhood of Locomotive Engineers v. Baltimore & O. R. R.*, 310 F. 2d 513 (7th Cir. 1962).

Sections of United States Code

Sherman Anti-Trust Act, 15 U. S. C. §1:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; * * * Every person who shall make any such contract or engage in any such combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." [July 2, 1890, c. 547, §1, 26 Stat. 209, as amended July 7, 1955, c. 281, 69 Stat. 282; 15 U. S. Code, Sec. 1. The so-called "Miller-Tydings" amendment of the Act of August 17, 1937, not affecting labor law is omitted.]

Interstate Commerce Act, 49 U. S. C. §5(1):

"§5. Combinations and consolidations of carriers.

(1) Pooling; division of traffic, service, or earnings.

Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; * * *".

THE IMPERIAL INSURANCE COMPANY, LIMITED.

Bayparl Building, Parliament Street,
Nassau, Bahamas.

SERVICE INTERRUPTION POLICY

Policy
No. 1981

Whereas The Long Island Rail Road Company (hereinafter called "Insured") shall pay the Premiums or Considerations (as stated in the attached wording) to The Imperial Insurance Company, Limited, an Insurance Company duly organized and existing under the laws of the Bahama Islands (hereinafter called "Company"), to Insure against Loss as per attached wording during the period commencing the first day of September 1959, and ending the first day of September 1962 both days at Noon Standard Time, Bahama Islands.

Now Know Ye that The Imperial Insurance Company, Limited does hereby bind itself to insure against Loss in accordance with the provisions of the attached wording.

In Witness Whereof the Company has caused this Policy to be executed by its duly authorized officer on this twenty-sixth day of August 1959 at Nassau, Bahamas.

For The Imperial Insurance Company, Limited.

(Illegible)
Director.

Countersigned

(Illegible)
Secretary.

APPLICATION

1981 for

SERVICE INTERRUPTION POLICY

Application for issuance of a policy of insurance for a term of three (3) years in the form attached is hereby made to The Imperial Insurance Company, Limited (herein called "Company") by The Long Island Rail Road Company (herein called "Applicant"), on the terms, conditions, representations, and definitions contained in said policy and in this application by all of which Applicant hereby agrees to be bound.

In support of this application, Applicant further agrees and declares as follows:

1. Applicant is a common carrier by railroad subject to the Interstate Commerce Act having its principal headquarters in the United States (excluding Alaska and Hawaii).

2. Address of Applicant to be inserted in Article XII of the policy as the address of the Insured is

   Jamaica Station Building
   Sutphin Boulevard and Archer Avenue
   Jamaica 35, New York

3. The Daily Indemnity to be specified in Article II of said policy is $50,000.00. Said Daily Indemnity does not exceed the average estimated daily cost or expense of the Applicant for the next 12 months attributable to the expenses described in Items (a) to (h) below and the average estimated daily cost or expense of the Applicant under conditions of temporary total suspension of operations by reason of a work stoppage attributable to the expense described in Item (i) below, namely:

(a) Ad valorem and other taxes on carrier property not based on revenues or income	$ 4,929.00
(b) Fixed interest on debt less the part apportionable to non-carrier property	$ 835.00
(c) Mandatory Payment to sinking funds provided for in mortgages on the Applicant's carrier property	$ .....
(d) Interest or dividends on equipment trust certificates or conditional sales agreements	$ 1,567.00
(e) Payments on the principal of equipment trust certificates or conditional sales agreements, or rents under leases or trackage agreements covering property used by the Applicant in its carrier operations	$ 4,154.00
(f) Insurance on carrier property or operations exclusive of this insurance	$ 781.00
(g) Pensions and payments into pension funds	$ 1,953.00
(h) Contractual or fixed obligations incurred in connection with its operations	$14,142.00

(i) The cost of the Supervisory, Official and other forces necessary in its opinion to preserve Applicant's carrier properties in a standby condition and effect resumption of services at the end of a work stoppage	$21,639.00
Total	$50,000.00

4. Applicant hereby expressly approves and accepts the Advisory Committee described in Article IV of the policy and agrees that said Advisory Committee shall exercise all the powers and duties pertaining to it described in the policy. Applicant further agrees that this application and each application by a railroad for similar insurance shall be submitted to the Advisory Committee in advance of the issuance of this or any similar policy, and that the Advisory Committee shall review such applications and, upon approval thereof, shall submit the same to the Company. Applicant hereby agrees to be bound by all the determinations of the Advisory Committee and that no liability to the Applicant, its stockholders or security holders shall be incurred by the Advisory Committee or individual members thereof by reason of any action taken by such Advisory Committee.

5. *Minimum Premium Formula.* The percent of the Insured's Daily Indemnity to be inserted in Article V (a) of the policy as the basis for the calculation of the Insured's minimum premium for the first year of this policy and for each ensuing year thereof shall be that percent which, when applied to the total of the currently applicable Daily Indemnities of Insured Railroads, will yield $500,000.

Not less than thirty (30) days before the first and second anniversary dates of this policy, the Insured shall submit to the Company a written statement of the items comprising its Daily Indemnity for the ensuing policy year. In the event the Insured fails to submit such written statement within the time prescribed therefor, the Insured's Daily Indemnity for the ensuing policy year shall be the same as for the previous policy year.

6. This application will not be effective unless and until applications for similar policies have been received by the Company for railroad applicants whose aggregate gross operating revenues in 1958 are 65% of the gross operating revenues for that year of all railroads operating in the United States (excluding Alaska and Hawaii) as reported to the Interstate Commerce Commission.

7. Applicant agrees that the insurance applied for in this application and the policy evidencing the same shall become effective upon the Company's acceptance of this application, evidenced when the Company issues and mails its said policy to the Insured. It is intended that the policy to be issued pursuant to this application shall have its inception as a contract in the Bahama Islands and that this policy shall be construed pursuant to the laws of the Bahama Islands.

Dated: July 31, 1959

The Long Island Rail Road Company
APPLICANT

By /s/ THOMAS M. GOODFELLOW
President and General Manager

Wording Attached to and Forming Part of

SERVICE INTERRUPTION POLICY

1981 Issued by

The Imperial Insurance Company, Limited

ARTICLE I. Subject to all the terms and conditions of this policy, the Company insures against loss, to the extent herein provided, directly resulting from a suspension of the Insured's operations, wheresoever conducted, caused by a work stoppage, as herein defined, commencing during the term of this policy.

ARTICLE II. The maximum daily loss against which insurance is provided hereunder (herein called the "Daily Indemnity") shall be the sum of $50,000.00 for the first year of this policy and for the second and third years the amount shall be as determined in accordance with the method prescribed in the application. In the event of a total suspension of Insured's operations by reason of a work stoppage the Daily Indemnity shall be payable for each day of such total suspension (not exceeding 365 days of such a suspension caused by a single work stoppage). In the event of a partial suspension of the Insured's operations or a total suspension for a part of a day caused by a work stoppage a part of the Daily Indemnity (herein called "Partial Daily Indemnity") in an amount necessary to reimburse the Insured for its deficiency in earning an amount equal to its Daily Indemnity and all expenditures reasonably and necessarily incurred in such partial operations (other than any such expenditures included in the Daily Indemnity), but in no event an amount in excess of the Daily Indemnity, shall be payable for each day (not exceeding 365 days of such a suspension caused by a single work stoppage).

ARTICLE III. DEFINITIONS—Whenever used in this policy without qualification the following terms shall have the meaning described below:

Insured Railroad—The term "Insured Railroad" shall mean any common carrier by railroad subject to the Interstate Commerce Act (including Insured) having its headquarters in the United States (excluding Alaska and Hawaii) which is insured under this policy or a similar policy issued by the Company.

Work Stoppage—The term "work stoppage" shall mean a cessation of work by a part or all of the employees of the Insured for the purposes of enforcing demands made by one or more labor organizations on, or of resisting proposals of, a common carrier by railroad in instances (1) where such cessation of work (a) is contrary to the provisions of the Railway Labor Act or (b) is to enforce demands contrary to the recommendations of an Emergency Board appointed by the President of the United States, pursuant to the Railway Labor Act or (c) is in resistance to the application of recommendations of such an Emergency Board, or (2) where the demands or proposals (a) are directed to or may then or thereafter affect or (b) are made by, Insured Railroads representing more than 50% of the aggregate of Insured Railroads' Daily Indemnities and such an Emergency Board has not been appointed or, if appointed, such Board has failed to make definite findings or recommendations on the merits thereof.

Daily Indemnity and Partial Daily Indemnity—The terms "Daily Indemnity" and "Partial Daily Indemnity" shall have the meaning given to them in Article II of this policy.

Suspension of Operations—The term "Suspension of Operations" or "Suspension of the Insured's Operations" shall mean any termination of or reduction in the train or switching operations of the Insured due to a work stoppage.

Day—The term "Day" shall mean a full calendar day from 12:01 A.M. to midnight local standard time.

ARTICLE IV. Advisory Committee

There shall be an Advisory Committee the members of which shall be the heads, ex officio, of the three regional railroad organizations, namely the Eastern Railroad Presidents Conference, the Association of Southeaster Railroads and the Association of Western Railways, and the Advisory Committee shall have the powers and duties described in this policy.

As a condition precedent to the issuance of this policy, the members of the Advisory Committee shall have delivered to the Company written acceptances of their membership thereon. In the event that a vacancy occurs on the Advisory Committee for any reason, or that any member is unable to perform his duties as such, the remaining members of the Advisory Committee shall declare the office vacant and may appoint a temporary successor to fill the vacancy until a permanent successor qualifies. Any such appointment of a temporary successor member or qualification of a permanent successor member of the Advisory Committee shall become effective upon written notice thereof delivered to the Company together with a signed acceptance of such membership.

Action by any two members of the Advisory Committee evidenced in writing signed by said members shall constitute action of the Advisory Committee.

Notices to the Company of determinations or other action of the Advisory Committee shall be signed by not less than two (2) members thereof and the Company shall be entitled to rely upon any such notice so signed as valid evidence of the determination or action of the Advisory Committee without further investigation.

The Insured authorizes the Advisory Committee to:

(a) Examine and investigate each notice of suspension of operations by reason of a work stoppage given it by the Insured under the provisions of this policy and determine whether such suspension comes within the coverage of this policy; and, in the event such suspension is deemed covered, compute the amount due Insured hereunder;

(b) Perform the duties assigned to it by the provisions of Article V of this policy;

(c) Upon request by the Company, advise it and make determinations with respect to any questions arising under this policy; and

(d) Perform any and all other duties called for in this policy or in the application therefor.

The Company may rely upon all representations and determinations made by the Advisory Committee, and shall incur no liability in consequence of acting upon the same. The Insured agrees to be bound by such representations and determinations of the Advisory Committee and that no liability to the Insured, its stockholders or security holders, shall be incurred by the Advisory Committee or individual members thereof by reason of any action taken by such Advisory Committee.

ARTICLE V.

(a) PREMIUMS

The Insured shall pay to the Company before this policy is issued the Insured's minimum premium for the first year consisting of 2.5651% of the Insured's Daily Indemnity expressed in this policy, namely the sum of $1,282.58. Not later than fifteen (15) days before the first and second anniversary dates of this policy the Insured shall pay to the Company the Insured's minimum premium for the second and third years of this policy, respectively, determined in accordance with the minimum premium formula set forth in the application.

Upon notice from the Company, the Insured shall thereafter pay to the Company additional premiums when and as they are determined by the Company to be payable by the Insured as hereafter provided, subject to the Insured's maximum premium (including the minimum premium) for each year of this policy of twenty times the Insured's Daily Indemnity provided for in Article II of this policy.

No additional premium shall be payable by the Insured with respect to any day for which it is entitled to indemnity pursuant to the provisions of Article II of this policy.

The additional premiums of the Insured shall be an amount equal to that proportion of the aggregate of the Daily Indemnities and Partial Daily Indemnities determined to be payable to Insured Railroads (other than the Insured) for each day for which any of said Insured Railroads are entitled to indemnity pursuant to the provisions of Article II of their policies, which the Insured's Daily Indemnity bears to the total of such Daily Indemnities on the policies of all Insured Railroads that are liable for the payment of additional premiums for such day.

(b) Determination and Notice of Daily Indemnities and Partial Daily Indemnities Payable

Upon the occurrence of a suspension of operations for which the Insured claims indemnity, the Insured, on forms furnished by the Company and approved by the Advisory Committee, shall mail promptly notice thereof to the Company and to the Advisory Committee, with sufficient information and data for determination whether the Daily Indemnity is payable to the Insured and, if less than the full Daily Indemnity, the amount of any Partial Daily Indemnity payable to the Insured. A similar notice shall be mailed to the Company and to the Advisory Committee for each day during which said suspension of Insured's operations shall continue.

The determination of whether the Daily Indemnity or a Partial Daily Indemnity is payable to the Insured and, in the case of a Partial Daily Indemnity, the amount thereof, shall be made by the Advisory Committee.

(c) Determination Notice and Payment of Additional Premiums Due

Upon determining that the Daily Indemnity or Partial Daily Indemnity is payable to the Insured under this policy, the Advisory Committee shall immediately mail written notice of such determination to the Company and to the Insured stating the day for which said Daily Indemnity or Partial Daily Indemnity is due and, if a Partial Daily Indemnity, the amount thereof. A separate notice of such determination shall be mailed to the Company and to the Insured by the Advisory Committee for each day for which it is determined that there is a suspension of operations for which Daily Indemnity or Partial Daily Indemnity is due but the notices with respect to more than one Insured Railroad may be combined.

The Company, not later than two (2) days after receipt from the Advisory Committee of one or more such notices of determination of Daily Indemnity or Partial Daily Indemnity payable to the Insured under this policy or to other Insured Railroads shall compute and determine the additional premium due from Insured Railroads liable for the payment of additional premium for the day for which said notices were given.

The Company shall mail to each of said Insured Railroads and to the Advisory Committee notice of additional premium due from said Insured Railroads, with respect to each day as to which Daily Indemnities or Partial Daily Indemnities have been determined to be payable.

Such additional premium shall be paid to the Company promptly upon receipts of notice thereof. If the Company does not receive such additional premium within fourteen (14) days after it mails to the Insured notice thereof the Company may draw upon the deposit provided by the Insured pursuant to the provisions of paragraph (h) of Article VI hereof by check or draft which must be countersigned by the Advisory Committee.

(d) Payment of Daily Indemnities and Partial Daily Indemnities

The Company shall pay the Daily Indemnity or Partial Daily Indemnity determined to be payable to the Insured, for each day for which it is determined to be payable, not later than twenty one (21) days following receipt by the Company from the Advisory Committee of written notice of its determination that the Daily Indemnity or Partial Daily Indemnity is payable to the Insured for that day, provided that all conditions in this policy shall have been complied with, and all other terms and conditions of this policy shall have been met.

(e) Conditions Precedent to Company's Liability

It is hereby understood and agreed that the following conditions are absolute and precedent to the liability of the Company for the payment to the Insured of the full Daily Indemnity or Partial Daily Indemnity determined to be payable to the Insured for any day in accordance with the terms of this policy:

(i) that the Insured shall have duly paid to the Company the Insured's minimum premium and Insured's additional premiums, if any, provided for in this policy, subject however to the Insured's maximum premium provided for in this policy;

(ii) that each Insured Railroad shall have duly paid to the Company its minimum premium and its additional premiums, if any, as provided for in its policy subject, however, to the maximum premium provided for in its policy;

(iii) that the Company shall have on hand, over and above minimum premiums paid to it, sufficient funds collected as additional premiums from Insured Railroads to pay the Daily Indemnity or Partial Daily Indemnity determined to be due to the Insured and to all other Insured Railroads;

(iv) that the Company and the Advisory Committee shall have received from the Insured prompt notice in writing of the suspension of Insured's operations for such day in the form prescribed in Article V (b);

(v) that the Company shall have received from the Advisory Committee written notice of its determination that the Daily Indemnity or Partial Daily Indemnity

is payable to the Insured for such day for which the same is determined to be payable as provided in Article V (b).

(f) Procedure in Event Conditions Precedent Not Complied With

In the event that any of the conditions precedent to the Company's liability for the payment of the full Daily Indemnity or Partial Daily Indemnity for any day is not complied with, but the Insured shall nevertheless have performed all of the conditions and obligations applicable to it under this policy, the Company shall remain liable for the pro rata payment to the Insured of the Daily Indemnity or Partial Daily Indemnity for such day to the extent possible with the additional premiums paid by Insured Railroads which it has on hand or shall thereafter receive for such day and the manner of apportioning said payments by the Company and the time of said payments shall be determined by the Advisory Committee which shall give to the Company a written notice of its determination, and the Insured shall be bound by such determination of the Advisory Committee.

ARTICLE VI.

(a) No Payments Due for Any Day for Which More Than 50% of Daily Indemnities of Insured Railroads Are Payable

The Company shall have no liability to pay the Daily Indemnity or a Partial Daily Indemnity to the Insured for any day for which the total of the Daily Indemnities or Partial Daily Indemnities due Insured and other insured Railroads (except for the provisions of this paragraph) exceeds 50% of the total Daily Indemnities referred to in

Article II of this policy and the policies of all other Insured Railroads.

(b) Liabilities for Indemnities and Additional Premiums to Continue After Expiration Date of Policy Under Certain Conditions

In the event that the Insured suffers a total or partial suspension of operations caused by a work stoppage commencing before the term of this policy expires, the Company shall remain liable for the payment of Daily Indemnities and Partial Daily Indemnities until the termination of any such work stoppage, not to be limited by the expiration of the term of this policy, subject, however, to all the other terms and conditions of this policy.

In the event an Insured Railroad other than Insured suffers a total or partial suspension of operations caused by a work stoppage commencing before the term of its policy expires, Insured shall remain liable for the payment of additional premiums in accordance with the terms of this policy until the termination of any such work stoppage, not to be limited by the expiration of the term of this policy, subject, however, to all the other terms and conditions of this policy.

(c) Limitation of Liability for Additional Premiums

For any day on which the Insured sustains a partial suspension of operations but for which it is not entitled to a Partial Daily Indemnity, it shall be liable for the payment of the additional premiums required pursuant to the provisions of this policy, provided, however, that if Insured would have been entitled to a Partial Daily Indemnity had such payment been included as a part of the expenses of operation for that day, on final audit such Partial Daily Indemnity shall be payable to Insured.

(d) Minimum Premium Not to Be Returned on Cancellation

The Insured's minimum premium paid pursuant to the provisions of Article V (a) of this policy shall not be returnable to the Insured in the event the Insured cancels this policy.

(e) Effective Date of Policy

This policy shall become effective for the term of three (3) years stated in the first paragraph hereof when the policy is mailed by the Company to the Insured. The dates of inception and expiration of the terms of similar policies of insurance issued by the Company to all railroads shall be the same provided, however, that similar policies of insurance may be issued by the Company for terms commencing with any anniversary date of this policy and ending with the date of the expiration of the term of this policy.

(f) Similar Policies

Every policy issued by the Company insuring a railroad against loss resulting from a suspension of operations caused by a work stoppage shall be identical in terms and conditions to this policy (except as to the amount of Daily Indemnity and amount of Initial Premium); and wherever the phrase "similar policy" is used in this policy, it shall mean a policy of such identical terms and conditions.

(g) Transfer of Functions of Advisory Committee to Company

The functions of the Advisory Committee pursuant to this policy, whether due to inability of the Advisory Committee to function or otherwise, may be transferred to the Company by a written notice from the Advisory Committee

to the Company that such a transfer is made and specifying the effective date thereof. On and after the effective date of such transfer the Company shall perform all the functions of the Advisory Committee under this policy and shall add the cost of so functioning as additional premium. The determinations of the Company when so functioning shall be binding on Insured Railroads. On written notice to the Company the Advisory Committee may resume performance of the functions so transferred.

(h) Insured's Deposit to Secure Payment of Premiums

Before this policy is issued, and in addition to the payment of the minimum premium expressed herein, the Insured shall deposit, and maintain throughout the term of this policy, with Barclays Bank D. C. O. Nassau, Bahamas in United States dollars, the Daily Indemnity of the Insured for one (1) day as provided for in Article II of this policy, and shall see to it that all necessary arrangements are made with said Bank (and that said arrangements are confirmed to the Company by the Bank in writing) whereby the Company, but not the Insured, may draw to its own order upon said deposit by check or draft countersigned by the Advisory Committee.

The Company shall draw upon said deposit only as provided in Article V (c) hereof.

The Insured shall not be deemed to be in default in the payment of the premium required of it pursuant to the provisions of this policy unless, following non-receipt of such premium from the Insured as provided in Article V (c), the Company issues a check or draft for such additional premium and either the Advisory Committee fails within a reasonable time to countersign such check or draft, or payment of such check or draft so countersigned by the Ad-

visory Committee is refused for any reason; and in such event the Insured shall be in default.

Upon the expiration of the term of this policy or upon cancellation of this policy or upon termination of this policy as provided in Article X the Insured may withdraw said deposit or the balance thereof less any amount which the Advisory Committee determines should remain on deposit to meet obligations of the Insured, by check or draft signed by the Insured and countersigned by the Advisory Committee.

(i) Effect of Default in Payment of Additional Premium

If the Insured becomes in default, as defined in this policy, in the payment of any additional premium due from it this policy shall terminate on the date of said default and the Insured shall not be entitled to any indemnities under this policy on and after the date of said default. After said default the Insured shall not be deemed an Insured Railroad for the purpose of any calculation of Daily Indemnity or Partial Daily Indemnity or premium under this policy or that of any other Insured Railroad. The Company shall nevertheless be liable to the Insured for any Daily Indemnity or Partial Daily Indemnity due it prior to the date of said default from which the Company shall deduct the amount of any additional premiums due from Insured for any day prior to the date of said default.

(j) No Offset

The Insured shall not be entitled to claim the amount of any liability of the Company to the Insured for the payment of any Daily Indemnity or Partial Daily Indemnity as an offset against the Insured's liability to the Company for the payment of premiums.

(k) Suspension of Indemnity Payments Upon Assumption of Governmental Control

In the event that the United States Government should assume the control and operation of the Insured's operations the obligation of the Company to pay any Daily Indemnity or Partial Daily Indemnity due the Insured for any day prior to such governmental assumption or control of operations shall be deferred but the Company shall nevertheless remain liable for the payment of such Daily Indemnity or Partial Daily Indemnity to the Insured and after control of operations has been returned to the Insured, said payments shall be made in the manner and subject to the conditions set forth in Article V. No benefits shall be payable to the Insured nor shall any additional premiums be payable by the Insured for any day for which the operations of the Insured are under the control of the Government.

(l) Policy Not Assignable

This policy shall not be assigned by the Insured without the written consent of the Company endorsed hereon and signed by an executive officer of the Company.

(m) Taxes

The Insured shall be liable for the excise taxes imposed by Section 4371 of the United States Internal Revenue Code and for the purchase and fixation to this policy of revenue stamps evidencing the payment of same. The Insured shall also be liable for any premium or remittance tax levied by any governmental authority, and in the event claim is made by such governmental authority against the Company for the payment of same, said tax shall be payable by the Insured and other Insured Railroads in the same manner as additional premiums.

(n) Place and Manner of Payment

All premiums due pursuant to the provisions of this policy shall be paid by the Insured by good check or draft in United States Dollars to the order of the Company delivered to the Company by mail, or otherwise as directed by the Company in writing, at its Home Office stated upon the face of this policy. All indemnities due pursuant to the provisions of this policy shall be paid by the Company by mailing to the Insured at its address stated in Article XII a good check or draft therefor in United States dollars to the order of the Insured or, at the direction of the Insured in writing, by depositing the amount thereof in United States dollars in Barclays Bank D. C. O. Nassau, Bahamas, to the general account of the Insured and mailing prompt notice of such deposit to the Insured at its address stated in Article XII. Payment of the indemnity due shall be deemed made upon the mailing of such check or draft or upon the making of such deposit.

(o) Audit and Adjustment of Accounts

As soon as practicable after the conclusion of each work stoppage sustained by the Insured and other Insured Railroads commenced during the term of this policy, and at such other times as the Advisory Committee shall determine, the Advisory Committee shall make an audit and adjustment of all additional premiums and indemnities due or paid under this and similar policies.

The determinations of the Advisory Committee with respect to underpayment or overpayment of premiums and indemnities shall be final and binding upon the Insured and all other Insured Railroads. In the event that the Advisory Committee determines that the Company has overpaid the Insured or any other Insured Railroad or that the Insured or any other Insured Railroad has underpaid its premiums,

it shall so notify the Company and the Company shall send to said Insured or Insured Railroad written notice thereof. The Insured or such other Insured Railroad will thereupon forthwith become liable for the payment to the Company of the amount set forth in said notice. In the event that said amounts are not paid to the Company after written request of the Advisory Committee, the Company shall bring action therefor upon satisfactory arrangements being made with the Company by the Advisory Committee to defray the cost of said action.

Upon receipt of notice from the Advisory Committee of its determination that the Insured or any other Insured Railroad has overpaid its additional premium or has been underpaid with respect to its indemnities, the Company shall make refund to Insured or any such other Insured Railroad but only to the extent that it has on hand, over and above minimum premiums paid to it by Insured Railroads, sufficient funds collected with which to make such refunds.

ARTICLE VII. Resumption of Operations

As soon as possible after the termination of any work stoppage the Insured shall resume to the greatest extent possible complete or partial operations. The Insured shall be free at any time, without prejudice to this insurance, to make with the labor organization or organizations concerned an agreement that results in a termination of such work stoppage.

ARTICLE VIII. Application for Policy

This policy is issued pursuant to the application of the Insured, a copy of which (except for the specimen copy of this policy attached thereto) is attached hereto and made a part of this policy.

ARTICLE IX. CANCELLATION

After one (1) year from the effective date of this policy, it may be cancelled by the Insured upon the giving of ninety (90) days' notice in writing to the Company. Such cancellation shall be effective at Noon, Standard Time, Bahama Islands, on the 90th day following the date upon which such notice was received by the Company, unless on such day one or more work stoppages exist on the property of any other Insured Railroad, in which case such insurance will cease at Noon, Standard Time, Bahama Islands on the date following the day on which all such work stoppages are terminated.

ARTICLE X. REQUIRED NUMBER OF INSURED RAILROADS

(a) If on any anniversary date of this policy minimum premiums for the ensuing year provided for in this and similar policies or accompanying applications for similar policies have not been paid to the Company not later than fifteen (15) days prior to such anniversary date by railroads the gross operating revenues of which for the preceding calendar year constitute at least 65% of the gross operating revenues for such year of all railroads operating in the United States in said year (excluding Alaska and Hawaii) as reported to the Interstate Commerce Commission, this policy shall terminate as of such anniversary date at Noon, Standard Time, Bahama Islands, unless on such date one or more work stoppages exist on the property of an Insured Railroad in which case this policy shall terminate at Noon, Standard Time, Bahama Islands, on the day following the day on which all such work stoppages are terminated. In the event of such termination any minimum premium paid by the Insured to the Company for the ensuing year shall be returned to the Insured.

(b) If at any time during the term of this and similar policies the gross operating revenues for the preceding calendar year of railroads having such policies in full force and effect does not equal at least 50% of the gross operating revenues for such year of all railroads operating in the United States in said year (excluding Alaska and Hawaii) as reported to the Interstate Commerce Commission, this policy shall terminate as of that date. In the event that this policy shall terminate by reason of the operation of this sub-paragraph (b), no part of the minimum premium for the policy year in which such termination takes place shall be returned by the Company to the Insured.

ARTICLE XI. RENEWAL

This policy shall be renewable for an additional period of three (3) years from the date of the expiration of the term of this policy provided that not later than ninety (90) days before said date the Company shall have received similar applications for renewals from Insured Railroads or new applications from other railroads having their principal headquarters in the United States (excluding Alaska and Hawaii) whose aggregate gross operating revenues in 1961 were at least 65% of the gross operating revenues for that year of all railroads operating in the United States (excluding Alaska and Hawaii) as reported to the Interstate Commerce Commission and provided that the Company shall have sent written notice of its acceptance of such applications not later than sixty (60) days prior to date of the expiration of the term of this policy and that all said applicants shall have paid to the Company the minimum premium provided for in their respective policies not later than fifteen (15) days before the date of the expiration of the term of this policy.

ARTICLE XII. NOTICES

Any notice to the Company provided for in this policy shall be given to it at the following address:

The Imperial Insurance Company, Ltd.
Bayparl Building
Parliament Street
Nassau, Bahamas

Any notice to the Insured provided for in this policy shall be given to it at the following address:

Mr. Thomas M. Goodfellow
President & General Manager
The Long Island Railroad
Jamaica Station Bldg.
Jamaica 35, N. Y.

Any notice to the Advisory Committee provided for in this policy shall be given to it at the following address:

The Advisory Committee
c/o Bureau of Railway Economics
Room 1016 Transportation Building
Washington 6, D. C.

ARTICLE XIII. CONTROLLING LAW

This policy shall be construed pursuant to the Laws of the Bahama Islands.

ARTICLE XIV. NO ORAL MODIFICATION OF THIS POLICY

This policy may not be modified or waived in any of its terms and conditions except by written endorsement of said modification attached to this policy signed by an executive officer of the Company and by the Advisory Committee and unless such modification endorsement is made applicable to the policies of all Insured Railroads.

Office Supreme Court, U.S.
FILED
AUG 9 1963
JOHN F. DAVIS, CLERK

No. 312

Supreme Court of the United States

OCTOBER TERM, 1963

W. P. KENNEDY, As President of the BROTHERHOOD OF RAILROAD TRAINMEN, et al., *Petitioners*,

v.

THE LONG ISLAND RAIL ROAD COMPANY, et al., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Dated: August, 1963.

TWENTIETH CENTURY PRESS, INC., CHICAGO 6

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COUNTERSTATEMENT OF THE CASE

This case grows out of a labor dispute between The Long Island Rail Road Company and the Brotherhood of Railroad Trainmen. The dispute arose from the Brotherhood's demand that the work week of Long Island trainmen engaged in short turn-around (commuter) service be cut to 5 days with no reduction in the pay received for a 6-day week. (App., pp. 21, 39; R., pp. 111-112; 591.)* During the period from November 2, 1959, to July 9, 1960, all procedures of the Railway Labor Act for settlement of a major dispute (negotiation, mediation, proffer of arbitration, and Emergency Board report) were exhausted, but no agreement was reached. (App., pp. 21-22, 39-40; R., pp. 111-121.) On July 10, 1960, the Brotherhood called its men out on

* "App." refers to the appendix to the Petition for Certiorari, where the opinions of the District Court and the Court of Appeals are printed. "R." refers to the printed record filed in this Court by petitioners. The stipulated facts and documents contained in the record were all received in evidence by the District Court as a single exhibit. (R., pp. 58-59.)

wide point of view and the interests of others instead of only its interests vis-a-vis plaintiffs . . ." * (App., pp. 27-28.). Rather, it was found (App., p. 28):

> "The insurance policy imposes no obligation on defendant requiring joint action or decision. In fact, it negates any such suggestions by specifically providing that 'the insured shall be free at any time, without prejudice to this insurance,' to make with the labor organization or organizations concerned an agreement that results in a termination of such work stoppage.' The Long Island's right to insurance payments in case of work stoppage covered by its policy was in no way dependent upon the popularity of the Long Island's bargaining position with other railroads.
>
> "The record shows that, at no time, was anyone but the Long Island conducting the bargaining through its own officers and for itself alone.
>
> "The counter offers made by the Long Island during the bargaining, its receptiveness to the recommendation of the Emergency Board, its willingness to submit the dispute with plaintiffs to arbitration, refute any contention that other roads controlled the Long Island in its bargaining under the Railway Labor Act."

REASONS FOR DENYING THE WRIT

The sole question which the petition presents for review is whether the railroads' strike insurance "constitutes a per se violation of the anti-trust policies of the United States . . ." (Petition, p. 3.) Petitioners have abandoned their claim under the Railway Labor Act, upon which they placed primary reliance in the District Court. That issue has been settled, adversely to petitioners, by decisions of

* The quoted findings are from a section of the District Court's opinion (dealing with alleged multi-employer bargaining) that the Court of Appeals approved and adopted. (App., p. 45 note 7.)

this Court, most recently the decision in *Brotherhood of Locomotive Engineers* v. *Baltimore & O. R. Co.*, 372 U. S. 284 (1963). For strike insurance was payable to the Long Island only after settlement procedures of the Railway Labor Act were exhausted, and in the *Engineers* case this Court ruled that parties to a rail labor dispute "having exhausted all of the statutory procedures, are relegated to self-help . . ." (372 U.S. at 291.) Cf. *N.L.R.B.* v. *Insurance Agents Union*, 361 U.S. 477 (1960).

Petitioners now attempt to portray this case as an antitrust case. But the record presents no question of importance in the administration of the antitrust laws. The railroads' strike insurance has no real relationship with the subject matter of the antitrust laws. Petitioners' claims fail, as the Court of Appeals ruled, "for the fundamental reason that [the provisions of the Sherman Act and Interstate Commerce Act upon which petitioners rely] were designed principally to outlaw restraints upon commercial competition in the marketing and pricing of goods and services and were not intended as instruments for the regulation of labor-management relations." (App., p. 46.) That ruling is unquestionably sound. It follows controlling authority, the decision of this Court in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940). Accord, *Schatte* v. *International Alliance of Theatrical Stage Employes*, 182 F.2d 158, 167 (9th Cir. 1950), cert. denied, 340 U.S. 827 (1950). Cf. § 20 of the Clayton Act, 38 Stat. 738 (1914), 29 U.S.C. § 52; *United States* v. *Hutcheson*, 312 U.S. 219 (1941).

There is clearly no conflict in decisions for this Court to resolve. Petitioners' sole reliance (Petition, pp. 6-7) upon *Anderson* v. *Shipowners Assn.*, 272 U.S. 359 (1926), is misplaced. That case did not deal with any restraint upon a market for labor treated as a "commodity" but with a

restraint on the freedom of shipowners and operators to carry on commerce "according to their own choice and discretion." (272 U.S. at 365.) The concept underlying the *Anderson* decision is no longer law in light of the *Apex Hosiery* case, *supra*, where this Court held that hindrance of the operation of the vehicles of commerce does not constitute a restraint of trade. And, in any event, the *Anderson* case is inapplicable to the facts of the instant case because both courts below have found that no restraint on the freedom of the Long Island arose from its participation in the strike insurance program. (*Supra*, pp. 3-4.)

Petitioners sum up their argument that this is an antitrust case by stating that "the A. A. R. has been converted . . . to a giant, unregulated monopoly in the area of purchasing labor." (Petition, p. 7.) Even if this assertion were factually correct (and it is not), it raises no antitrust issue. As both the District Court and the Court of Appeals correctly stated, Section 6 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. §17, specifically provides that "the labor of a human being is not a commodity or article of commerce." (App., pp. 31, 47.)

The sole question presented in this damage action arising from a labor dispute—whether strike insurance "constitutes a per se violation of the anti-trust policies of the United States"—has been correctly decided by the courts below. Since none of the arguments advanced in the petition raise any issue not already settled by the decisions of this Court, no question is presented which is of sufficient substance to merit review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: August, 1963.